

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

11-2086
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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2086

PHILIP McCRORY,

Petitioner-Appellant,

- v -

J. E. LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

BRIEF FOR PETITIONER-APPELLANT
PHILIP McCRORY

DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. NO. 226-6684

ATTORNEY FOR PETITIONER-APPELLANT
PHILIP McCRORY

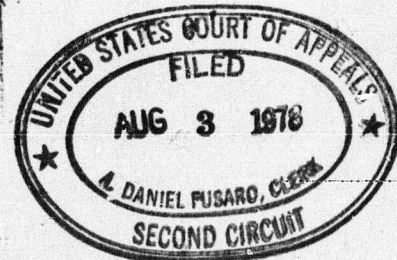


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PRELIMINARY STATEMENT

Petitioner-appellant Philip McCrory appeals from an order of the United States District Court for the Southern District of New York (Robert L. Carter, U.S.D.J.) denying his application for a writ of habeas corpus. In July, 1973 the petitioner-appellant was convicted after a jury trial in the Supreme Court, Bronx County of rape, sodomy, sexual abuse, robbery, and burglary, all in the first degree, and possession of a weapon. On September 24, 1973, he was sentenced to consecutive terms having an aggregate minimum term of ten years and an aggregate maximum term of thirty years. The judgment of conviction was modified by the Appellate Division, First

Department on April 25, 1975, to the extent of reversing and dismissing convictions for the crimes of sexual abuse in the first degree and possession of a weapon as inclusory concurrent counts. As modified the petitioner-appellant's sentence was reduced to eight years four months to twenty-five years. *People v. McCrory*, 47 A.D.2d 887, 367 N.Y.S.2d 22 (1st Dept. 1975) Leave to appeal to the Court of Appeals was denied on October 7, 1975. During the pendency of his direct appeal, the petitioner-appellant moved in the state court for a new trial, based on newly discovered evidence. On June 10, 1975, Justice Alvin F. Klein denied the motion. Thereafter, on August 7, 1975, the Appellate Division denied leave to appeal in the collateral attack. Petitioner-appellant subsequently brought a pro se petition for habeas corpus under 28 U.S.C. § 2254 in the Southern District of New York, claiming, *inter alia*, that his forced compliance with New York's notice of alibi statute absent any reciprocal discovery was violative of the Supreme Court's decision in *Wardius v. Oregon*, 412 U.S. 470 (1973) and that false alibi rebuttal was knowingly allowed to stand by the prosecutor in violation of the due process clause of the Fourteenth Amendment. See, *Napue v. Illinois*, 360 U.S. 264 (1959). On June 22, 1977, the Honorable Robert L. Carter denied the writ in a written memorandum. (Appendix, Exhibit B) On July 27, 1977, Judge Carter granted the petitioner-appellant's application for a certificate of probable cause. On June 21, 1978, this attorney was appointed under the Criminal Justice Act as counsel for appellant.

PROCEEDINGS IN THE STATE COURT

On February 22, 1972, the petitioner-appellant, Philip McCrory ("McCrory") was indicted by a Bronx County grand jury for multiple counts of rape, sodomy, robbery, burglary, and lesser offenses. The indictment joined four unrelated criminal incidents allegedly perpetrated by McCrory. The first group of counts charged McCrory with raping both Sallie McIntyre and Florine Crews at McIntyre's apartment in the early morning of June 28, 1971. Later on that morning McCrory allegedly committed another double rape, this time on a roof top. The victims of the alleged roof-top rape were Etneta Harris and Josette Jackson. The third and fourth alleged criminal incidents were perpetrated on other dates and against other victims.

In response to an oral demand pursuant to Crim. Pro. L. § 250.20*, on July 26, 1972, the defense served the people with the names and addresses of two women, Lorraine Smith and Denise Robinson, who would place McCrory away from the scene of the crimes he allegedly committed on June 28, 1971, against the four women. Since the New York notice of alibi statute then

*Crim. Pro. L. § 250.20, then in force, reads: 1. At any time before trial, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within four days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. 2. If at the trial the defendant calls such

in force* did not provide for reciprocal discovery, the defense did not obtain advance notice of the people's rebuttal witnesses, even though approximately one month before McCrory's trial commenced the United States Supreme Court held in *Wardius v. Oregon, supra*, that the due process clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.

On June 28, 1971, Assistant District Attorney Bruce Goldstone subpoenaed the alibi witnesses to his office and interviewed them.

The trial which commenced on July 12, 1973, before the Honorable Alvin Klein and a jury tried only the alleged double rape of Ms. McIntyre and Ms. Crews, the other charges having been severed by the court after the defense prevailed in a motion to have all unrelated charges tried separately.

THE TRIAL

THE PEOPLE'S CASE

Sallie McIntyre lived in a two bedroom apartment on the second floor of 1563 Inwood Avenue in the Bronx. On Saturday evening June 26, 1971, she was visited by Florine Crews, a friend of hers from Philadelphia. Ms. Crews remained overnight at Ms. McIntyre's apartment. On Sunday, June 27, 1971, they

an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

*Since amended to comply with *Wardius*, L. 1974 ch. 420, eff. May 23, 1974.

spent an uneventful day together, having a few drinks at a local bar. On Sunday night they both went to bed early, sharing the same bed. On the night in question the bedroom window was left open and covered by a screen. This bedroom window opened directly onto a fire escape. [Tr.* McIntyre - 54-55, 75-83; Crews - 127-128, 147-151]

Soon after both women fell asleep, they were suddenly awakened by the presence of a male stranger, later identified by both McIntyre and Crews as McCrory, who was lying across both of them and brandishing a knife. The stranger cautioned, "If either one of you makes a move, the other one of you will get hurt." The stranger then instructed both women to disrobe. Over the next several hours the stranger forced both women to perform many sexual acts with him, including intercourse. He also required the women to perform sexual acts between themselves. Unable to ejaculate through all of this contact, the stranger finally achieved a physical climax through self-masturbation. [Tr. McIntyre - 57-65, 69, 91-96, 102, 120-121; Crews - 129-133, 158-164] Theft became the strangers next objective. The victims told him that their valuables were on a chair. The stranger turned on the bedroom light, drew a pistol, and said "Don't make no noise because I'll shoot." He then began rummaging through the apartment for valuables, taking money from each victim's purse, a ring, a watch, and two Poloroid cameras. The stranger then required Ms. McIntyre to lead him to the outer hallway. From there he ran down

*"Tr. citations are to the transcript of the trial. "H." citations are to the combined pre trial *Wade* and *Miranda* hearings.

the stairs and escaped. Sallie McIntyre reentered her apartment and immediately called the police. [Tr. McIntyre - 66-70, 98-99; Crews - 134-136, 165-169]

After the police arrived, Ms. McIntyre observed that the screen to the bedroom window had been displaced, suggesting that the culprit had secured entry into her apartment through the fire escape. Ms. McIntyre gave a description of the culprit to the police officer, to wit: 5 feet 10 inches to 6 feet tall, medium build, medium brown complexion, thin moustache and a goatee (apparently coinciding generally with how McCrory looked at the time of his arrest). The victims were then driven by the police to the Morristown Hospital where they were given vaginal and rectal examinations. [Tr. McIntyre - 100-101]

On January 20, 1972, almost six months after the rape had been committed, Detective Joseph Basteri visited Sallie McIntyre and went over her description of her assailant. Following this, the officer showed her a group of fifteen photographs out of which she selected the defendant McCrory's picture and identified him as the culprit. On January 26, 1972, Detective Basteri traveled to Philadelphia to meet with Florine Crews and had her view the same set of pictures. She also selected McCrory's photograph from the pile, identifying him as the rapist. [H. Basteri - 3, 11-16]

On January 31, 1972, Detective Basteri, assisted by four other officers, arrested McCrory at his home on University Avenue in the Bronx. After being advised of his *Miranda* rights,

he was taken to the 42nd Precinct station house. McCrory's companion, Lorraine Smith, who was present at the defendant's apartment at the time of his arrest, also went to the station house. Upon arrival Detective Basteri, after readvising McCrory of his constitutional rights, told him that he was being charged with the rape of McIntyre and Crews. Basteri gave fine details of the incident in an effort to draw McCrory out. McCrory responded that "I didn't do these things." "A person who would do these things must be sick." Detective Basteri pressed on by suggesting that such a sick person could be helped with medical treatment and by further suggesting that McCrory himself might be in need of such help. Finally, McCrory asked to confer alone with his companion Lorraine Smith who was waiting in another room. Detective Basteri then spoke to Lorraine Smith privately. He told her that her mate had definitely committed the crimes charged and that she should help persuade him to confess. Such a confession, Basteri told Smith, would facilitate the treatment and rehabilitation. After this briefing, Lorraine Smith spoke with McCrory privately. One half hour later, McCrory emerged and said to Basteri, "Well, if they said I did these things, I must have done them. I don't remember." When Basteri pressed McCrory to admit that he in fact could recall committing the crimes, McCrory responded, "All I can say, I probably did it but I don't remember because when I drink I don't remember doing many things." [Tr. Basteri - 196-204, 207-213, 220-221]

On February 10, 1972, McCrory was placed in a lineup at the Bronx District Attorney's office. He appeared clean shaven although at the time of his arrest he sported a moustache and goatee. Ms. McIntyre and Ms. Crews separately viewed the lineup and identified McCrory as the perpetrator. [Tr. McIntyre - 66, 71-73; Crews - 178-183, 188, 192; Basteri - 206, 218]

THE DEFENSE

Lorraine Smith testified that she had been living with McCrory for three years at 1842 Sedgewick Avenue in the Bronx. She had no criminal record and was employed as a clerk in the cashier's department of Merrill Lynch in 1971. Smith related that on June 18, 1971, she wrote a letter to her friend Denise Robinson who lived in St. Albans, Queens, informing her that she and "Philly" (Philip McCrory) would be out for a visit the following Saturday or Sunday. [Tr. 335-336] The letter in her writing and an envelope post marked June 20, 1971, also in her handwriting, was produced, identified, and eventually introduced in evidence through Denise Robinson when she later testified. [Tr. 326] Smith maintained that true to her word she and McCrory visited with Denise Robinson on Sunday, June 27, 1971, arriving in the late afternoon. They had dinner and talked and then on the spur of the moment decided to go to "Times Square" to see a late movie. [Tr. 230] So it was that Lorraine Smith, her mate McCrory, Denise Robinson, and Robinson's two-year old daughter Shannon traveled by bus and then by subway to Times Square and saw the movie "Love Story." The movie broke at

about 10 p.m. [Tr. 234] Instead of everyone going his or her separate way, Denise Robinson, who was fearful of traveling so late at night with her toddler on the subway, invited Smith and McCrory to spend the evening at her apartment. The quartet therefore returned to Robinson's apartment, arriving approximately at midnight. They all went to bed around 1 a.m. and arose the next day at 6 a.m. Instead of going off to work that morning, Smith went shopping with McCrory in the early part of the day, and later the two went to Coney Island. Merrill Lynch's employment records were introduced to show that Ms. Smith did not report to work on Monday, June 28, 1971. [Tr. 321]

In the course of the prosecutor's cross examination, he attempted to pin down the name or if not the name, then the precise location of the movie theater where "Love Story" had been seen on the night of June 27th. Ms. Smith could not recall the name of the theater, nor could she be definite, after a more than two year lapse of time, about its specific locality.

Q How far was it [the movie theater] from the subway?

A I don't recall.

Q Approximately.

A A couple of blocks. We walked - couple of blocks.

Q Could you tell us where it was from where you got out of the subway?

A I don't remember. We walked around.

[Tr. 271-272]

The prosecutor also elicited from Denise Robinson that the theater played only "Love Story" and that there was no double feature.

Q Was "Love Story" the only movie that was playing
or was it a double feature?

A Single feature.

Q Sure of that?

A Pretty sure.

Denise Robinson, a bank teller at the County Trust Bank, also testified for the defense. Robinson testified that as a result of a letter she received from Lorraine Smith earlier in the week of June 19th, she expected a visit from Smith and McCrory on the following weekend. She further testified that there was nothing peculiar about her saving the very letter she testified about receiving because she generally saved all her personal letters. [Tr. 334] Ms. Robinson, who like Ms. Smith had no criminal record, also swore that Smith and McCrory paid her the visit on Sunday, June 27, 1971; furthermore that they then went to see the movie "Love Story" at a "Manhattan" movie theater and that after the movie they all returned to her house for the night. [Tr. 326-328]

On cross examination the prosecutor once again attempted to obtain the name of the movie theater the quartet went to or its precise location. Ms. Robinson responded that although she hardly knew the city she had the impression that she was somewhere in the Times Square movie district. [Tr. 350-351] The following colloquy ensued concerning this:

Q Now how far did you walk [once out of the subway]
to get to see "Love Story"?

A I don't know. We just walked to the movie.

Q Well, about how far?

A Well - two blocks, block, two. It wasn't too long.

[Tr. 351]

. . .

- Q Could you explain what you mean by not very long?
Would it mean less than twenty blocks, less than
ten blocks, less than five blocks, or less than
two blocks, or less than a block?
- A I would say less than five blocks.

[Tr. 352]

Denise Robinson also testified on cross examination that no double feature played at the movie theater. In fact, her recollection was that they entered toward the end of one showing and left where they came in on the next showing. Therefore, there could not have been a double feature. [Tr. 359-360]

THE PEOPLE'S REBUTTAL

Alex Fodor, an assistant bookkeeper for Paramount Pictures, testified that on June 27, 1971, his company was the sole distributor of the movie "Love Story" in metropolitan New York. [Tr. 388] The following questions were then put to the witness by the prosecutor:

- Q Could you tell me if there were any movies within a five-block radius of 42nd Street and Eighth Avenue playing the movie "Love Story"? (emphasis added)
- A Yes, Apollo 42nd Street.
- Q Was the Apollo 42nd Street - First, was that the only movie within that area playing "Love Story"? (emphasis added)
- A Yes.
- Q Was it playing just "Love Story" or "Love Story" and some other movie?
- A Yes, the so-called second feature.
- Q What was the second feature?
- A Title of it was "Violent Four."

[Tr. 388]

On cross examination counsel asked Fodor the following question:

Q Now was it ["Love Story"] being featured at any other theater in the general Times Square area? (emphasis added)

A No.

Louis Spano, the assistant manager of the Apollo 42nd Street Theater was the second rebuttal witness called. He testified that although the double feature for "Love Story" and the "Violent Four" was showing at the Apollo 42nd Street Theater on June 27, 1971, the newspaper advertisements on that date listed only "Love Story" and omitted any reference to the second feature playing with it. [Tr. 389-395]

Spano also testified that a movie feature, according to policy, would not play at more than one neighborhood theater at the same time. [Tr. 393]

Etneta Harris and Josette Jackson followed as witnesses on rebuttal. These women were named as rape victims in counts 21 through 34 of the indictment. The trial on these charges had previously been severed on a defense severance motion. In a bill of particulars filed by the prosecutor on April 27, 1972, the defense was advised that the alleged crimes against Harris and Jackson were perpetrated by McCrory on the same date as the crimes committed against McIntyre and Crews, only later in the morning - 5 a.m. - on a roof top.

Etneta Harris testified that between 4 a.m. and 5 a.m. on June 28, 1971, she saw McCrory in the hallway of her building. At the time Harris was with her friend, Josette Jackson. Harris went on to testify that for two hours she and Jackson remained

in the company of McCrory. She was sure of the date "because of what happened." [Tr. 396-397] Josette Jackson, residing at 270 East 161st Street, testified that on the morning of June 28, 1971, she was with Etneta Harris. In the early part of the morning she was with Harris at a bar. Later she and Harris were on the roof top of Harris's apartment building in the presence of McCrory and remained in his company for about an hour. In response to the prosecutor's question as to whether she was certain that she saw McCrory at that time, Jackson stated, "Yes I'll never forget him. I'll never forget that man." [Tr. 416] Hamstrung by the certainty that any cross examination of either Harris or Jackson would elicit another damaging rape allegation, defense counsel put virtually no questions to either witness.

THE PROSECUTOR'S SUMMATION

Lorraine Smith and Denise Robinson were called fabricators and liars based upon the supposedly irrefutable proof that "Love Story" played as a double feature and not as a single feature as they claimed. The prosecutor argued, rather convincingly, that Smith and Robinson, in search of a palatable story, had probably dug up an old newspaper from the library and relied on an erroneous movie advertisement that "Love Story" was playing at the Apollo as a single feature. [Tr. 479-480]

The prosecutor also capitalized on defense counsel's understandable disinclination to conduct a probing cross examination of Etneta Harris and Josette Jackson by suggesting that

counsel's non combativeness implied that he knew the witnesses were telling the truth. [Tr. 483]

THE COURT'S ALIBI CHARGE

At the conclusion of the court's alibi charge, the jury was instructed as follows:

... And I also charge you further that if after weighing all the evidence given in respect to the defense of alibi you then come to the conclusion that such testimony is false and that it has been interposed here intentionally as a false defense, then such finding of fact by you may be considered as a circumstance bearing upon the guilt of the defendant.

[Tr. 505]

THE NEWLY DISCOVERED EVIDENCE

Following his conviction, McCrory, though incarcerated, looked into the prosecutor's claim that in the vicinity of Times Square on June 27, 1971, the movie "Love Story" was only playing at the Apollo 42nd Street. From authoritative sources which have never been contested by the state, he learned that "Love Story" on June 27, 1971, was also playing at the Agee II theater located at 48th Street and Seventh Avenue, and playing there as a single feature.*

PROCEEDINGS IN THE DISTRICT COURT

After exhausting his state remedies on his claim of newly discovered evidence, McCrory sought federal relief by way of habeas corpus, claiming *inter alia* that the false alibi

*See, affidavit of Jack Jamal, proprietor of the Agee II theater, dated August 13, 1973; letter from Jack Jamal to Paramount Pictures dated March 21, 1975; and letter from Paramount Pictures to Jack Jamal, dated April 15, 1975. [Appendix, Exhibit C]

rebuttal was knowingly allowed to stand by the prosecutor and that his forced compliance with New York's notice of alibi statute absent any reciprocal discovery was violative of due process.

In the District Court no hearing was conducted on McCrory's claim of a knowing use of false rebuttal by the prosecutor despite the fact that the state did not deny the allegation. On June 22, 1977, Judge Carter denied McCrory's writ in a written memorandum. [Appendix, Exhibit B]

ARGUMENT

POINT I

THE PROSECUTOR'S FAILURE TO SERVE A PRE-TRIAL NOTICE OF ALIBI REBUTTAL WITNESSES DEPRIVED THE PETITIONER-APPELLANT OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT. HAD THERE BEEN DISCLOSURE INSTEAD OF SURPRISE THE PETITIONER-APPELLANT MAY HAVE PREVAILED IN HIS CASE. CONSEQUENTLY THE CONSTITUTIONAL ERROR WAS NOT HARMLESS BEYOND REASONABLE DOUBT.

In *Wardius v. Oregon*, *supra*, the defendant was precluded at trial from introducing alibi evidence as a sanction for his failure to comply with the Oregon notice of alibi rule. The Oregon statute did not provide for reciprocal discovery. The Supreme Court held that the due process clause of the Fourteenth Amendment bars enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. In *Wardius*, the court said:

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same

time subjecting him to the hazard of surprise concerning the refutation of the very pieces of evidence he disclosed to the state.

412 U.S. at 476

Wardius was decided approximately one month before McCrory was brought to trial, though after he served his alibi notice. In the aftermath of *Wardius* (but following McCrory's trial and before his state appeal was decided) the New York Court of Appeals in *People v. Bush*, 33 N.Y.2d 921 (1973) had occasion to review the notice of alibi provisions of § 295 L of the Code of Criminal Procedure (predecessor of Crim. Pro. L. § 250.20 under which this state made its pre trial demand here) and struck it down as unconstitutional. The court declared that the invalidity of the New York statute would apply prospectively to cases in which trial began after June 11, 1973 (the date *Wardius* was decided) and would not apply to cases where trial commenced prior to that date unless the rule was used as a sanction to prevent the introduction of alibi evidence. Since the trial in *Bush* commenced prior to the effective date and the defendant was permitted to introduce his alibi evidence, the Court of Appeals affirmed the conviction.

Like its predecessor, Crim. Pro. L. § 250.20 (reprinted in the margin at p.p. 3-4, *supra*) did not provide for reciprocal discovery.* Nor was reciprocal discovery available to McCrory

*The only significant difference between the code section and its successor is that the code section required service by the people of the alibi notice "not later than eight days before the case is moved to trial," whereas the Criminal Procedure Law statute permits such service "at any time before trial."

under any other discovery provision of the Criminal Procedure Law.* Accordingly, it is apparent that the state forced McCrory to reveal his defense by resort to an unconstitutional disclosure law. Judge Carter explicitly so found. [Appendix, Exhibit B, p. 4] Nevertheless Judge Carter rejected McCrory's claim on the ground that he showed no prejudice in the due process deprivation. Judge Carter reasoned that since McCrory was permitted to introduce his alibi evidence and did not ask for a continuance to meet the people's refutation evidence, no harm resulted from his forced compliance. [Appendix, Exhibit B, p.p. 4-5] In light of McCrory's post conviction discovery of another theater in the Times Square neighborhood playing "Love Story" as a single feature on June 27, 1971, we maintain here that prejudice has been demonstrated and that the constitutional infraction was not harmless error beyond a reasonable doubt. See, e.g., *Chapman v. California*, 386 U.S. 18 (1967)

Before the trial reached the rebuttal stage, the jury was squarely faced with the classic question of whom to believe.

*A defendant has recourse to two discovery provisions under the Criminal Procedure Law. The first, Crim. Pro. L. § 200.90, authorizes a bill of particulars. Evidentiary items, however, are not a proper subject for a bill of particulars. See, Denzer, Practice Commentary, McKinney's Cons. Laws of N. Y., Book 11A, p. 292. Indeed in this very case, McCrory moved in a demand for a bill of particulars for disclosure of the prosecution's witnesses and his motion was denied by Justice William Kappelman on May 5, 1972. The second discovery provision, Crim. Pro. L. § 240.20, provides only for the discovery of reports, documents, things, and the defendant's own statements, and does not provide for the discovery of the people's trial witnesses. Moreover, New York Common Law had no settled rule on the right to such discovery. Some courts held that witness identity is not discoverable. See, e.g., *People v. Hvizd*, 70 Misc. 2d 654, 334 N.Y.S.2d 534 (County Ct. Westchester 1972). Other courts held that disclosure may be required in the discretion of the court. *People v. Bennett*, 75 Misc. 1040, 349 N.Y.S.2d 506 (Sup. Ct. Erie County 1973).

Though their sincerity could hardly be questioned, Sallie McIntyre and Florine Crews first confronted the accused some seven months after the fact. The long lapse of time could well have blurred their memories and perceptions, and regardless of how convinced they were, both may have been mistaken. McCrory produced two very respectable women for his side. Neither had a criminal record and both held responsible positions. Although Lorraine Smith had a built-in bias favoring McCrory because she was and remained his mate, Denise Robinson had no motive to fabricate an alibi. In fact she barely knew McCrory. Moreover there was independent proof of McCrory's visit to Robinson's apartment on June 27, 1971, in the form of a letter sent by Lorraine Smith, advising Denise Robinson that she and "Philly" would visit on the weekend. See, *Mutual Life Insurance Co. v. Hellman*, 145 U.S. 285, 295-300 (1892) (statements of intention to perform an act may be evidence that the act was later performed); *United States v. Moore*, 571 F.2d 76 (2d Cir. 1978). Had this case been sent to the jury without the rebuttal, McCrory would have stood solid chances. But the wily prosecutor here had erected a clever ambush, which dramatically and unfairly altered the course of the trial to the state's advantage. Because of McCrory's forced compliance with the unconstitutional notice of alibi statute, the prosecutor was able to conduct thorough pre trial interviews of Smith and Robinson. The upshot was that he learned that both witnesses on the night in question

claimed to have been with McCrory to see "Love Story" at a movie theater in the Times Square vicinity and also learned that they claimed to have seen the movie as a single feature. The prosecutor then learned from Paramount Pictures where the movie was playing that night in the metropolitan New York area. Certainly, he must have learned not only that the movie was playing at the Apollo 42nd Street theater - there as a double feature - but also playing as well at the Agee II, six blocks north - where it played as a single feature.

Engaging in what appears to be sharp practice at the trial, the prosecutor then asked Alex Fodor, the Paramount Pictures representative:

Q Could you tell me if there were any movies within a five block radius of 42nd Street and Eighth Avenue playing the movie "Love Story?" (emphasis added)

A Yes, Apollo 42nd Street.

[Tr. 388]

On cross examination, Alex Fodor was asked:

Q Now was it ["Love Story"] being featured at any other theater in the general Time Square area?

A No.

[Tr. 389 emphasis added]

It is obvious that defense counsel failed to discover the Agee II one block up the street because he had been tricked by the prosecutor and the witness into accepting their private definition of Times Square ("within a five block radius of 42nd Street and Eighth Avenue"). He was tricked because he was ambushed; the exact kind of ambush that the *Wardius* court outlawed.

If prior to trial defense counsel had been informed that Alex Fodor would be called, counsel would have certainly been able to prepare for the trap that was being set and subsequently bring forth the true facts. Instead the prosecutor blocked the truth through surprise and prevailed. Once totally believable witnesses were proved liars. The clever prosecutor even showed how Robinson and Smith had concocted a major part of their story by resorting to an old newspaper which erroneously reported that "Love Story" was playing at the Apollo 42nd Street theater as a single feature. The court even allowed the evidence of this supposedly concocted story to be used as proof of McCrory's guilt. Contrary to the findings of Judge Carter, therefore, McCrory was indeed prejudiced in his forced compliance with the concededly unconstitutional statute, and the error for the reasons already stated was not harmless beyond a reasonable doubt.

POINT II

THE PETITIONER HAS MADE AN ADEQUATE SHOWING THAT MISLEADING AND FALSE EVIDENCE WAS KNOWINGLY EMPLOYED BY THE PROSECUTOR TO DISPROVE THE ALIBI. THE CASE SHOULD BE REMANDED FOR A HEARING AS TO WHAT THE PROSECUTOR KNEW, WITH INSTRUCTIONS TO DISMISS THE WRIT IF HE WILLFULLY ALLOWED MISLEADING AND FALSE EVIDENCE TO STAND.

For a prosecutor to convey or even to permit a false impression invades the area of due process and ordinarily requires a new trial. *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1966); *United States ex rel. Washington v. Vincent*, 525 F.2d 262 (2d Cir. 1975), Cert. Denied, 424 U.S. 934 (1975) 1.

The crux of the matter here is that the Agee II movie theater lies in the general vicinity of the so-called "Times Square" entertainment district and but one small city block north of where Robinson, after a more than two-year lapse in time, said she could have walked, and this movie theater was showing "Love Story" as a single feature on June 27, 1971. The jury, however, was not informed as much and was allowed to conclude that there was no single billing of "Love Story" in Times Square - which therefore ineluctably meant that the alibi witnesses were liars who relied in part on an old and erroneous newspaper advertisement. Inasmuch as the Paramount records were available to the prosecutor before the trial, it is virtually inescapable that he was aware of the Agee II and its showing of "Love Story" as a single feature on the night in question.

At the trial the prosecutor put what appears to be a carefully tailored question to Fodor, apparently designed to eliminate mention of the Agee II:

Q Could you tell me if there were any movies within a five block radius of 42nd Street and Eighth Avenue playing the movie "Love Story?"

On cross examination the prosecutor kept silent when Fodor answered "no" to the following question:

Q Now was it ["Love Story"] being featured at any other theater in the general Times Square area?

In the course of this litigation the state has never responded in any way to the petitioner's allegation that the

prosecutor had known the truth. Nevertheless, Judge Carter denied the petition because the petitioner had not proved that the prosecutor knew. [Appendix, Exhibit B, p.p. 5-6] The petitioner did the best he could from the available facts and lacks the power to compel the prosecutor to state what he knew. For hard proof, one way or the other, a hearing is necessary. We submit that a sufficient showing has been made to warrant a *Townsend** hearing.

CONCLUSION

For the reasons given above, the order of the United States District Court for the Southern District of New York on June 22, 1977, should be reversed and the case remanded to the District Judge with instructions to issue the writ of habeas corpus. Alternatively, the case should be remanded for a hearing to determine whether the prosecutor knowingly allowed false and misleading evidence to stand, with instructions to grant the writ if the District Court determines that the prosecutor acted with knowledge of the facts.

DATED: New York, New York
July 31, 1978.

Respectfully submitted,

David Blackstone
401 Broadway
New York, New York 10013
Tel. No. 226 6684

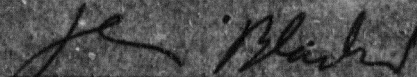
Attorney for Petitioner-Appellant
Philip McCrory

**Townsend v. Sain*, 372 U.S. 293 (1963).

AFFIRMATION OF SERVICE

DAVID BLACKSTONE, a member of the Bar of the State of New York, hereby affirms to the following.

On the 2nd day of August, 1978, I caused a copy of the foregoing brief and appendix to be served upon the Honorable Louis J. Lefkowitz, New York State Attorney General, by depositing same in postage-paid wrappers, properly addressed in the United States Mail, and that at the time of such service I knew the address to be the correct address by prior papers and proceedings heretofore had herein.



DAVID BLACKSTONE

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification
By Attorney

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

☐ Individual
Verification

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

being duly sworn, deposes and says: deponent is
in the within action; deponent has read
and knows the contents thereof; the same is true to

☐ Corporate
Verification

the
a
foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

in the within action; deponent has read the
and knows the contents thereof; and the same
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

Check Applicable Box

☐ Affidavit
of Service
By Mail

On 19 deponent served the within
upon
attorney(s) for
in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit
of Personal
Service

On 19 at
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on

19

at

M.

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

Index No.

77-2086

Year 19

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PHILIP McCRORY,

Petitioner-Appellant,

- v -

**J. E. LA VALLE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,**

Respondent-Appellee.

AFFIRMATION OF SERVICE

DAVID BLACKSTONE

Attorney for **PHILIP McCRORY**

Office and Post Office Address, Telephone

401 Broadway
NEW YORK, NEW YORK 10013
Tel. No. 226-6684

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for